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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 452 MISC.

WILLIAM VANDERWYDE,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF

RUDOLPH STAND,
Counsel for Petitioner.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, William Vanderwyde, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered on January 15, 1953, affirming a judgment of conviction and sentence of death imposed by the Court of General Sessions, New York County, upon a verdict convicting petitioner of the crime of Murder in the first degree.

Summary Statement of Matter Involved

The petitioner was convicted of Murder in the first degree after a trial by a special or so-called "blue ribbon" jury in the Court of General Sessions, New York County. The petitioner was sentenced to death (R. 295-6).*

* References, unless otherwise indicated, are to the pages of the certified record of the trial submitted herewith.

The New York State Court of Appeals on January 15, 1953 unanimously affirmed, without opinion, the judgment of conviction (304 N. Y. 937) and ordered and adjudged that the original sentence of death imposed upon the petitioner shall be executed the week of March 2, 1953.

A stay of execution was granted by Honorable Edmund H. Lewis, Associate Judge of the Court of Appeals of the State of New York, on February 27, 1953 pending the determination by this Court of the present application.

Grounds Upon Which the Jurisdiction of This Court Is Invoked

We respectfully submit that this Court has jurisdiction to entertain this petition for a writ of certiorari under Title 28, United States Code, Section 1257 (3) and Rule 38 of the Rules of the Supreme Court of the United States.

This petition is filed within ninety days from January 15, 1953, the date of entry of the judgment of affirmance, as required by law (28 U. S. C., § 2101 (c); Supreme Court Rule 38½).

At and before the trial and on his appeal to the Court of Appeals of the State of New York, the petitioner, invoking the protection of the Fourteenth Amendment of the Constitution of the United States contended:

(1) that the order of the trial court, dated March 27, 1952 granting the motion of the Disrict Attorney for a special jury to try the issues herein, over the opposition of the defendant, was based upon moving papers which were wholly insufficient to warrant the relief applied for; that the granting of said motion for a special jury on insufficient papers constituted a denial of due process and a violation of the defendant's rights under the Fourteenth Amendment of the Constitution of the United States.

(2) that Section 749-aa, subd. 4 of the Judiciary Law of the State of New York as construed and applied in this case constituted a denial of due process and a violation of petitioner's rights under the Fourteenth Amendment to the Constitution of the United States.

These fundamental Federal questions sought to be reviewed by this Court were properly raised by petitioner in all proceedings before the trial court and in the Court of Appeals as shown by the following page references to the certified record of the trial submitted herewith (Notice of Appeal, R. 2-4; Endorsement on Indictment reciting the defendant's opposition to the motion for a Special Jury R. 7; Motion for Special Jury, Affidavit in support of motion and order for Special Jury, reciting the appearance of defendant's counsel in opposition thereto, R. 12-17; Motion by defense counsel at the opening of the trial opposing the court's order that the issues by tried before a special jury, R. 19-20; the Court's order for additonal special jurors, reserving the defendant's objection to the trial by the special jury panel, R. 24).

After the Court of Appeals of the State of New York affirmed the judgment of the court below, it amended its remittitur on February 26. 1953, to read, as applicable to the petitioner, as follows:

"Questions under the Federal Constitution were presented and necessarily passed upon by this court, viz., (1) the appellant contended that the order of the trial court, dated March 27, 1952 granting the motion of the District Attorney for a special jury to try the issues herein, over the opposition of the defendant, was based upon moving papers which were wholly insufficient to warrant the relief applied for; that the granting of said motion for a special jury on insufficient papers constituted a denial of due process and a violation of the defendant's rights under the Fourteenth Amendment of the Constitution of the United

States. (2) The appellant contended that section 749-aa (4) of the Judiciary Law of the State of New York as construed and applied in this case constituted a denial of due process and a violation of his rights under the Fourteenth Amendment of the Constitution of the United States. This court held that the rights of defendant under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied."

Questions Presented

Whether the right of a defendant to be accorded due process of law under the provisions of the Fourteenth Amendment of the Constitution of the United States has been invaded and violated:

(a) when the order of the trial court, granting the motion of the District Attorney for a special jury—as distinguished from a general jury—to try the issues herein, over the opposition of the defendant, was based upon an affidavit in support of the motion (R. 14-15) which did not allege any facts but recited only legal conclusions by merely repeating the words of the statute (N. Y. Judiciary Law, Sec. 749-aa, subd. 4).

(b) whether in these circumstances Section 749-aa, subd. 4 of the N. Y. Judiciary Law as construed and applied in this case constituted a denial of the due process of law or equal protection clause of the Constitution because the right to a special jury is purely statutory and may not be granted for the mere asking, but can only be claimed in the manner and on the grounds provided in the statute upon a sufficient factual affidavit in support of the application.

Statute Involved.

The pertinent statutory provisions will be found in Appendix A, *infra,* page 21.

Brief Summary of the Facts

The petitioner has been convicted of the deliberate and premeditated murder of his friend, Benjamin Dietz, who was shot to death on May 18, 1951 at about 11:30 P. M. on a public street in the Greenwich Village section of New York City (R. 84-6; 221-2; 223-5).

There was no evidence of any previous quarrels, ill-feeling or difficulties between them or of any other motive for the killing. On the contrary, the proof established an entire absence of any motive and showed that the accused and the deceased were good friends for a number of years, up to the very day of the homicide (R. 221-2; 223-5). There were no confessions or admissions in evidence.

The conviction rested entirely upon the testimony of one witness alone—an off-duty police officer who testified to a series of strange fortuities which led to the arrest of the petitioner.

The officer professed that he was the sole eyewitness at the scene of the crime and saw the actual shooting of the deceased by the petitioner (R. 84-6). According to the officer's unsupported story, he accidently came upon two men—both of whom he had known for many years—arguing on the street and at that precise moment he claims to have overheard one of them utter some vile language followed by the firing of five shots at the deceased (R. 85; 103). When the assailant turned to run away, the officer claimed that with gun drawn he pursued him through a maze of streets, culminating in the shooting of the petitioner by the officer after a four-block chase (R. 118-120; 301).

The alleged chase did not take place in a rural wilderness but in the crowded residential area of Greenwich Village, where there is activity at all times of the day and night in a section filled with many homes, night clubs, restaurants, bars and grills and other places of business (R. 41; 154-6).

The defense contended that the evidence utterly failed to establish the guilt of the defendant beyond a reasonable doubt. The defendant was convicted on the officer's uncorroborated story. The reliability of this alleged eyewitness was the foundation of the entire case. Without the officer's testimony, there was no case. With it—the defense maintained—there was worse than no case, in the light of the substantial discrepancies, contradictions, inconsistencies and improbabilities revealed in his cross-examination (R. 103-163).

The trial was an extremely brief one for a capital case. The printed record consists of 296 pages. There was nothing at all about the case which was complicated or intricate.

We recite these matters to stress the point that there was absolutely no basis for the claim made in the affidavit in support of the motion for a special jury that "the facts in the case involve intricate questions of fact and law * * *" (R. 15).

An examination of the record will demonstrate that this claim is frivolous, for it did not involve an issue that any qualified juror selected from the general jury panel could not decide fairly, impartially and without prejudice.

In the supporting affidavit it is also stated (R. 15):

> "that the due, efficient and impartial administration of justice in this case will be advanced by the trial of this issue by a special jury, drawn and selected pursuant to law."

Before the selection of the special jury, defense counsel moved that the prosecutor make available to him the record

maintained in his office with respect to the "past performances" of any special juror who has previously served in a capital case (R. 20). It was not denied that the District Attorney kept a confidential record containing the names of such special jurors, together with a record of the cases in which they served, as well as the verdict rendered in each particular case. Obviously the "due, efficient and impartial administration of justice" would not be advanced, if such information were concealed from the defense.

Although the trial judge granted the defendant's application in this case (R. 21), the subject will be dealt with later in order to call this Court's attention to a system in operation for many years of empanelling special juries, whereby a prosecutor is enabled to exclude a proposed special juror who may have served on an acquitting jury by utilizing his thirty peremptory challenges and thus bring about—unknown to the defense—a jury constituted in whole or in part of such special jurors who have heretofore voted for conviction.

Reasons for Allowance of Writ

1. Appended hereto in support of this petition is the highly significant Survey Relating to Special Juries found in the 18th Annual Report (*1952*) of the Judicial Council of the State of New York (Appendix B, *infra*, p. 23).

In 1947 and 1948 this Court—on the basis of the record then presented—sustained the constitutionality of the New York special jury statutes in two cases, in five to four decisions (*Fay* v. *New York*, 332 U. S. 261 (1947); *Moore* v. *New York*, 333 U. S. 565 (1948)).

In view of these cases, the Judicial Council conducted a survey for the purpose of re-evaluating its past recommendations for the abolition of special juries as unjust, undesirable and unnecessary in the light of presently existing facts. Reasserting its belief that the basic concept of a special jury is repugnant to the traditional right of a person to be tried by a jury of his peers and commenting

on the *Fay and Moore* decisions, *supra,* the Judicial Council:

> "* * * suggested that a re-appraisal of the application of standards under the law on a current basis might have changed the result. * * *
>
> The wisdom of sending men to the electric chair on their conviction by a jury selected under a system which four justices of the Supreme Court of the United States have condemned as unconstitutional on weaker evidence of its defects than is here presented is questionable. Especially is this true when there is a constitutional system already in existence, the merit of which is publicly testified to by judges in our courts who are in daily contact with it" (Appendix B, *infra,* p. 23, at pp. 158-9).

2. In the *Fay* and *Moore* cases, *supra,* no questions appear to have been raised, as in this case, as to, (*a*) the sufficiency of the affidavit in support of the motion for a special jury, which failed to allege all the essential *facts* necessary to bring the case within the conditions imposed by the statute respecting special juries (R. 14-15), and (*b*) whether, in these circumstances, the statute involved as construed and applied to the petitioner constituted a denial of the due process of law or equal protection clause of the Constitution, since the right to a special jury exists only in those cases provided for in the statute and should not be granted as of course.

3. We respectfully submit that the ruling below was not only wrong, but warrants review by this Court because of the public importance of the question, when considered from the viewpoint of presently existing facts as revealed by the Judicial Council's Survey Relating to Special Juries in its 18th Annual Report, 1952 (Appendix B, *infra,* p. 23).

4. The Judicial Council's exhaustive and critical analysis of the problem adequately meets the questions raised by

this Court in the *Fay* and *Moore* cases, *supra,* particularly in the tables appended to its Survey, dealing with the Disposition of Defendants Tried Before Special Juries; Comparisons of Occupations of Special and General Jurors; Comparison of the Education of Special and General Jurors; and Comparison of the Number of Women on Special and General Jury Panels (Appendix B, *infra,* pp. 167-71). We submit that these official statistics reflecting presently existing conditions furnish the most cogent reasons for a further consideration and complete re-examination of this important question in the administration of justice.

5. By reason of the limited number of the jurors (about 3,000) on the special panel, the same jurors are frequently summoned and examined in successive cases, year in and year out, so that it is not unusual to find on any special panel of 125 or more, a predominant number who have served before in capital cases.

As shown by the record in this case (R. 20-21) the District Attorney's office in New York County is armed with information as to the "past performances" of the "repeater" jurors in prior cases and knows whether they served on juries voting for conviction. We know that a similar system also prevails in Kings County.

Individual judges may in some cases as a favor allow this secret information to be given to defense counsel, but some judges refuse to do so upon the ground that such records are confidential. If a judge refuses to provide the defense with the information concerning the past activities of any proposed juror, a trial under such a system lacks the fundamental essentials of due process and shocks one's sense of right and fair play. "* * * the cards (are) stacked from the beginning" (*Frazier* v. *United States,* 335 U. S. 497, 517, Jackson, J., dissenting).

One of the fundamental safeguards to an impartial trial is thus broken down and one of the securities to an

impartial verdict is overthrown. This question arises frequently in the trial courts, but the precise point does not appear to have been previously decided by this Court.

WHEREFORE, your petitioner respectfully prays that this petition for a writ of certiorari should be granted.

Dated: New York, N. Y.,
March 26, 1953.

WILLIAM VANDERWYDE,
Petitioner,

By: RUDOLPH STAND,
Counsel for Petitioner.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari, and that in my opinion it is well founded and the cause is one in which the petition should be granted.

RUDOLPH STAND,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

Opinion Below

The Court of Appeals of the State of New York affirmed, without opinion, the judgment of conviction and death sentence imposed upon petitioner. The case is reported, *People* v. *Vanderwyde*, 304 N. Y. 937.

Jurisdiction

The statement under which the jurisdiction of this Court is invoked is set forth in the petition.

Statement of the Case

The statement of the questions presented and the factual matter relevant to this application appear in the petition; in the interest of brevity they will not be repeated here.

Argument

The reasons relied on for the allowance of the writ are set forth in the petition.

POINT I

The order granting the motion for a special jury was based upon insufficient moving papers and constituted a denial of due process and a violation of petitioner's rights under the Fourteenth Amendment to the Federal Constitution.

The petitioner was tried, over his objection, by a jury selected from a panel of special or so-called "blue ribbon" jurors (R. 7; 12-17; 19-20; 24). The notice of motion for

a special jury, the District Attorney's affidavit in support thereof and the order for a special jury are printed in the record (R. 12-17).

We quote from the pertinent provisions of Section 749-aa, subd. 4 of the Judiciary Law of the State of New York as to the *procedural* and *factual* requirements of an application for a special jury:

> "Whenever an issue of fact has arisen in any * * * criminal action, * * * the district attorney * * * may apply for a special jury to try such issue. Such application * * * must be made upon the indictment, the plea thereto and an affidavit * * * upon two days' notice to the adverse party or his attorney. Where, upon such application, it appears to the court that by reason of the importance or intricacy of the case, a special jury is required, * * * or that for any other reason the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury, the court * * * may make an order directing that such trial be had by a special jury * * *."

Notice of the application to the adverse party, as provided in the statute, presupposes that the party moved against may have a legal right to oppose the application if he desires. Such motion, therefore, does not differ from any other application which an adverse party may have legal grounds to resist. Upon the return of such application, the accused is entitled to an opportunity to be heard and it is then clearly the Court's duty, if such motion be contested, to hear both sides, consider the arguments advanced by each of them and then judicially determine the propriety of the application.

A mere glance at the District Attorney's affidavit in support of the motion (R. 14-15) will suffice to show its insufficiency, since no *facts* whatever are stated therein upon which a judicial determination could be fairly based. The moving affidavit simply contains a bare repetition of

the words of the statute (R. 15) and the trial Court was therefore without jurisdiction to grant the order.

> "An affiant who simply repeats the words of the statute, merely states his opinion upon the proposition to be proved. Proof requires that *facts* be stated from which the conclusion sought may be logically drawn" (*Kennedy* v. *Lamb,* 182 N. Y. 228, 233).

The right to a special jury is purely statutory and can only be claimed in the manner and upon the grounds provided. The simple fact that a defendant is charged with murder, in and of itself, did not warrant the granting of the application. If such fact alone were sufficient, the statute would have so provided in plain and express terms. Any interpretation of the statute which reads such a provision into the law is a forced, strained and arbitrary construction.

If the Legislature intended that every capital case on application of the District Attorney *must* be tried by a special jury, the statute would have provided that an order be made *ex parte* upon the indictment itself and that such order be served on the accused specifying the time when the drawing of such special jury shall take place, the number of special jurors to be drawn, the term of the Court and the particular day in the term when such special jury must attend. Otherwise, why should the statute require notice of the application to the adverse party and also require that such application be made, not only upon the indictment, but upon an affidavit showing facts which bring the case within the statute?

Let us examine the affidavit in support of the motion (R. 14-15) and see whether or not it meets the test imposed by law.

First: As to the alleged "importance" of the case, we contend that every criminal case is of importance, involving as it does, either the life or liberty of an individual.

SECOND: As to the bald assertion that the facts in the case involve "intricate questions of fact and law." The moving affidavit, however, fails to show what are these intricate questions of fact and law to justify the extraordinary remedy applied for. In any event, intricate questions of law, if any, concerned the Court and not the triers of the facts. Now, that the record is before this Court will the respondent still contend that the facts in this case are intricate? By what strange magic is an "intricate" case for the purposes of a *motion* suddenly transformed into a "simple" case when it is shifted from a motion part to a trial term part of the court? The whole procedure is nothing but a transparent fiction, for the prosecutor showed no shadow of cause for his claim that this was an "intricate" case.

THIRD: As to the alleged unnecessary delay and difficulty in obtaining an ordinary jury, we submit there was no substantial basis for this assertion since the record shows that in addition to the original panel of 125 special jurors, the trial judge directed that 100 additional special jurors be impanelled over the objection of the defense (R. 18; 24).

FOURTH: As to the allegation that the "due, efficient and impartial administration of justice in this case will be advanced by the trial of this issue by a Special Jury", we have already pointed out the farcical nature of this claim because of the system in operation with respect to the secret records kept by the prosecutor of "repeater" jurors. Such system is clearly in opposition to the due, efficient and impartial administration of justice. The American tradition of trial by jury, necessarily contemplates an impartial jury drawn from a cross section of the community (*Smith* v. *Texas*, 311 U. S. 128, 130).

The system criticized here bears some resemblance to the case of *Frazier* v. *United States*, 335 U. S. 497, where the petitioner was convicted in a federal court in the District of Columbia of violating the Harrison Narcotics

Act. There the jury was composed entirely of employees of the Federal Government. Although the judgment was affirmed by a sharply divided court of five to four, the dissenting opinion of Mr. Justice Jackson at pages 518-9, is pertinent here:

> "And in cases where a strong minority of the Court has wanted to go so far as to upset a state jury system, as offensive to fundamental considerations of justice spelled out from the due process clause of the Fourteenth Amendment, there has been no such brazen unfairness in actual practice. *Moore* v. *New York,* 333 U. S. 565; *Fay* v. *New York,* 332 U. S. 261."
>
> * * *
>
> "In federal courts, over which we have supervisory power, * * * a system is in operation which has produced and is likely again and again to produce what disinterested persons are likely to regard as a packed jury" (Mr. Justice Frankfurter, Mr. Justice Douglas and Mr. Justice Murphy join in this opinion).

Upon review of a state court decision wherein a claim of a right under the Federal Constitution was denied, this Court will examine and appraise for itself the evidence relating to such right. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights (*Smith* v. *Texas,* 311 U. S. 128, 130; *Chambers* v. *Florida,* 309 U. S. 227, 228-9).

POINT II

Section 749-aa, subd. 4, as construed and applied to the petitioner constituted a denial of the due process of law or equal protection clause of the Federal Constitution.

While we concede that the application if properly made and for proper reasons, is addressed to the sound discretion of the Court, we respectfully contend that no con-

struction should be put upon the statute that would allow it to be wholly disregarded or to be lightly considered. On the contrary, courts should be reluctant to grant application for a special jury and should deny such applications except in cases where there is a showing of a real necessity therefor. The statute should be strictly construed and not extended by implication to cases not falling within its terms.

We are aware that the statute has been upheld as constitutional by the New York courts (*People* v. *Dunn,* 157 N. Y. 528) decided in 1899. We do, however, contend that the statute, as construed and applied to the petitioner in this case, is unconstitutional in that it denied petitioner the due process of law guaranteed to him by the Fourteenth Amendment to the Federal Constitution.

A statute may be constitutional as applied to one set of circumstances and unconstitutional when it is made to cover a situation not embraced within its contemplation (*Nashville, C. & St. L. Ry. Co.* v. *Walters,* 294 U. S. 405; *Mintz* v. *Baldwin,* 2 F. Supp. 700, affirmed 289 U. S. 346).

> "As the selection of a panel of special jurors was a departure from the ordinary methods of criminal procedure, strict compliance with the statute is necessary" (*People* v. *Damron,* 160 App. Div. 424, affirmed 212 N. Y. 256).

The proceeding for the selection of a special jury is a special proceeding in which the requirements of the statute must be strictly followed (*Industrial & General Trust* v. *Tod,* 104 App. Div. 518).

It may be claimed by the respondent, that the present case is governed by *People* v. *Hall* (1901), 169 N. Y. 184 where the Court of Appeals reviewed an order granting a special jury and there held that, inasmuch as the indictment was for the crime of murder in the first degree that such fact alone was sufficient to warrant the making of the order, in the sound discretion of the Court. Indeed,

the respondent in the Court below, took the position that the affidavit challenged here was in the "usual form".

The reason underlying the *Hall* case, *supra*, 169 N. Y. 184, 196-7, appears to rest on the assumption that in prescribing the qualifications of special jurors, "the legislature seems to have had capital cases primarily in mind, for the Commissioner is prohibited from selecting any person as a special juror" who (a) has conscientious scruples against the death penalty, or (b) who has such opinions as would prevent a verdict of guilty in any case upon circumstantial evidence, or (c) who has a prejudice against any particular defense to a criminal charge as would prevent his finding a fair and impartial verdict upon its merits. The Court there further said at pages 196-7:

> "The Commissioner is required to personally examine every one selected as a special juror with reference to these matters *among others* before making the selection." (Italics ours.)

Let us examine the statute (Judiciary Law, Sec. 749-aa, subd. 2) and note what these other matters are. We find that the Commissioner is prohibited from selecting (d) a person who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise and render an impartial verdict on the evidence, (e) a person who has any prejudice against any state law, or (f) a person who avows that he cannot in all cases give to a defendant who fails to testify the full benefit of the statute that such failure shall not create any presumption against him.

Obviously, all the matters stated above except as to (a) the infliction of the death penalty if the crime charged be punishable by death, have general application to *any* criminal case. Yet it has never been urged that an accused may be put to trial before a special jury, over his objection, because the case against him rests, for instance, solely upon circumstantial evidence.

The statute clearly limits the granting of the application to such cases as are shown by competent and sufficient proof to come within its scope. A special jury should not be ordered generally, systematically or indiscriminately for the mere asking. That is the basic error of the Court below. Such a result will produce injustice.

The *Hall* case, *supra,* 169 N. Y. 184 was decided over 50 years ago. The administration of criminal justice has made great progress since then. Special juries or "Blue Ribbon" juries as they are commonly called have been the subject of wide-spread and well-founded criticism. In its Fifth Annual Report, the Judicial Council, among other things, said:

> "The Council's report pointed out in addition that the legal requisites prescribed for the special juries are substantially the same as the legal requisites prescribed for a general or ordinary jury. In consequence, as might have been expected, such a special juror inevitably feels superior and such a special jury system becomes distinctly un-American and not consonant with a trial by one's peers."

The Judicial Council has for many years recommended the abolition of the special jury system as un-American and since 1940 as no longer necessary (Ninth Annual Report, 47, 50 (1943)).

In its 18th Annual Report (1952) of the Judicial Council, annexed hereto (Appendix B, *infra,* p. 23), it summarizes its findings as follows at page 158:

> "1. The special jury is no longer needed because the general jury system is producing a fair cross section of the community capable of determining any case.
>
> 2. There are no objective statutory qualifications by which the selection of special jurors may be differentiated from those selected for the general jury panel.

3. The special jury panel is a less fair cross section of the community than the general jury panel because of greater imbalances as to:

(a) occupation, there being a disproportionate weighting in favor of 'business' people as opposed to 'working' people;

(b) educational qualifications;

(c) sex, there being a smaller proportion of women to men on the special jury panel than on the general jury panel."

The Judicial Council was established by the Legislature (Judiciary Law, §§ 40-48) to make a continuous survey and study of matters relating generally to the administration of justice in all courts of the State. Its membership includes the Chief Judge of the Court of Appeals, the presiding justices of each Appellate Division of the Supreme Court and leading members of the Bar and of the Legislature (Hon. Herbert Brownell, Jr.—now Attorney General of the United States—is one of the signers of the 18th Annual Report (1952)).

Even before the impartial re-appraisal of the problem by this official body on the basis of presently existing facts and conditions, Mr. Justice Murphy in his dissenting opinion in the *Fay* case, *supra,* 332 U. S. 261, 296 (concurred in by Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Rutledge), declared in 1947:

"The equal protection clause of the Fourteenth Amendment prohibits a state from convicting any person by use of a jury which is not impartially drawn from a cross-section of the community. That means that juries must be chosen without systematic and intentional exclusion of any otherwise qualified group of individuals * * *. Only in that way can the democratic traditions of the jury system be preserved * * *."

CONCLUSION

For these reasons, it is respectfully submitted that this Court should grant a writ of certiorari as prayed for in the petition.

RUDOLPH STAND,
Counsel for Petitioner.

Appendix A

NEW YORK JUDICIARY LAW, SEC. 749-aa,
SPECIAL JURORS IN CERTAIN COUNTIES.

* * *

"4. Application for special jury. Whenever an issue of fact has arisen in any civil or criminal action triable in a county embraced within the provisions of this section, the district attorney, or the defendant, if in a criminal action, or either party in a civil action may apply for a special jury to try such issue. Such application may be made at any term of the supreme court appointed to be held within the county where such issue is triable, or at any term of any other court of record in which court such issue is to be tried. It must be made upon the indictment, the plea thereto and an affidavit in a criminal action or the pleadings and affidavit in a civil action upon two days' notice to the adverse party or his attorney. Where, upon such application, it appears to the court that by reason of the importance or intricacy of the case, a special jury is required, or that the subject-matter of the indictment or the issue to be tried has been so widely commented upon that the court is satisfied that an ordinary jury cannot without delay and difficulty be obtained to try such issue, or that for any other reason the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury, the court to which the motion is made may make an order directing that such trial be had by a special jury, and such trial shall be had accordingly. * * *"

Appendix B

RECOMMENDATION AND SURVEY RELATING TO THE ABOLITION OF SPECIAL JURIES.

EIGHTEENTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK (1952).

(See opposite ☞)

STATE OF NEW YORK

EIGHTEENTH ANNUAL REPORT

OF

THE JUDICIAL COUNCIL

OF

THE STATE OF NEW YORK

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Executive Secretary

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RECOMMENDATION AND SURVEY RELATING TO THE ABOLITION OF SPECIAL JURIES

I. Introduction and Summary

In its Third Annual Report in 1937,[1] the Judicial Council recommended the abolition of special juries. This recommendation has been consistently renewed since that time.[2]

The Council's approach to the problem is indicated by the following excerpts from the Council's Fourth Annual Report to the Legislature in 1938 (pages 46–47):

> "The Judicial Council has been attempting to improve the general jury system to such a point that extraordinary juries of any kind will no longer be necessary. To this end, the Council recommended women jurors, limitations on jury exemptions, and the abolition of struck, foreign and special juries, all of which recommendations were put into effect, except the abolition of special juries. . . .
>
> "The Judicial Council believes that every petit jury should be of uniformly high calibre and capable of giving a fair trial in all cases. To attain this goal, the ordinary jury, as now provided, may be in need of improvement. It is, however, unjust and should be unnecessary to select supposedly special juries in specific cases."

Improvement in the quality of jurors on the general panel has long since been accomplished by applying to all jurors the standards which formerly were required only of special jurors,[3] with the result that the general panel now represents a true cross section of the community.

In 1941, provisions of the statute which had permitted the use of special juries in Nassau and Westchester Counties, where, however, such juries had not been utilized, were eliminated.[4]

In 1947 and 1948, the cases of *Fay* v. *New York*[5] and *Moore* v. *New York*,[6] in which the Supreme Court of the United States by five to four decisions upheld the constitutionality of the special

[1] 3 N. Y. Judicial Council Report 34, 121–28 (1937).

[2] 4 N. Y. Judicial Council Report 46–8 (1938); 5 N. Y. Judicial Council Report 42–3 (1939); 8 N. Y. Judicial Council Report 39–41 (1942); 9 N. Y. Judicial Council Report 47 (1943); 10 N. Y. Judicial Council Report 41–2 (1944); 11 N. Y. Judicial Council Report 49–50 (1945); 12 N. Y. Judicial Council Report 53 (1946); 13 N. Y. Judicial Council Report 53 (1947); 14 N. Y. Judicial Council Report 72 (1948); 15 N. Y. Judicial Council Report 87 (1949); 16 N. Y. Judicial Council Report 95 (1950).

[3] 11 N. Y. Judicial Council Report 50 (1945). See note 8 *infra*.

[4] See text at note 10 *infra*.

[5] 332 U. S. 261 (1947).

[6] 333 U. S. 565 (1948).

jury law as it was then shown to have functioned by the evidence in those two cases, suggested that a re-appraisal of the application of standards under the law on a current basis might have changed the result.

In view of the above developments together with the fact that it is now more than a decade since the facts showing the operation of the special jury system were collected and presented by the Council, the Council has made this survey and re-evaluation of the subject covering the judicial years 1941 through 1950.

As a result, the Judicial Council renews its recommendation that special or so-called "blue ribbon" juries for counties having a population of one million or more, under the sole provision now left permitting special juries and applicable only to the counties of New York, Bronx, Kings and Queens, be abolished.

Conclusions that follow from the Council's survey are:

A. With respect to the use of the special jury, the special jury provisions apply only to New York, Bronx, Kings and Queens Counties. However, the special jury is used only in New York, Bronx and Kings Counties.[7]

In New York, Bronx and Kings Counties the special jury is used:

1. Almost exclusively in the trial of murder first degree prosecutions;

2. Almost exclusively upon request made by the district attorney.

B. Comparison between the composition of the special jury and general jury panels in the four counties where it may be used shows:

1. The special jury is no longer needed because the general jury system is producing a fair cross section of the community capable of determining any case.

2. There are no objective statutory qualifications by which the selection of special jurors may be differentiated from those selected for the general jury panel.

3. The special jury panel is a less fair cross section of the community than the general jury panel because of greater imbalances as to:

(a) occupation, there being a disproportionate weighting in favor of "business" people as opposed to "working" people;

(b) educational qualifications;

(c) sex, there being a smaller proportion of women to men on the special jury panel than on the general jury panel.

[7] Only six special juries were used in Queens County from 1941 to November 1948, and none since then.

While there are no adequate facts that prove that the special jury is a convicting jury since it cannot be assumed that a banker is more "prejudiced" against a person accused of murder than a plumber, or that males are more prone to convict than females, or that the more educated are so inclined to a greater extent than the less educated, the special jury does not measure up to the theory that a jury should represent a fair cross section of the community.

Even though murder trials are in some respects more "important" than others, there does not seem to be any factual basis for the assumption that they are more difficult of proof or more complex or require more understanding or ability on the part of the jurors than many other types of cases. Nor can it be seriously argued that murder trials in counties of more than one million population are more intricate or difficult of comprehension than in counties of less than one million.

Trying one indicted for murder in Kings County by a special jury, aside from any question of constitutionality, but trying those similarly indicted in nearby Nassau County by a general jury does not readily appeal to reason or sound public policy.

The wisdom of sending men to the electric chair on their conviction by a jury selected under a system which four justices of the Supreme Court of the United States have condemned as unconstitutional on weaker evidence of its defects than is here presented is questionable. Especially is this true when there is a constitutional system already in existence, the merit of which is publicly testified to by judges in our courts who are in daily contact with it.[8]

II. Discussion

Section 749-aa of the Judiciary Law[9] authorizes the use of special juries in counties having a population of one million or more, *i.e.*, New York, Kings, Queens and Bronx. Special juries were formerly authorized in Westchester and Nassau Counties but were abolished by the Legislature in 1941 upon recommenda-

[8] In People v. Brandenberg, 75 N. Y. S. 2d 851, 854 (Bronx Co. Ct. 1947), Judge Stackell, denying a special jury in a case charging abortion and conspiracy to commit abortion, said, "From my observation of many years on the bench, I have had abundant opportunity to note the excellent qualities of our juries. The understanding which they have of their responsibilities as jurors and the general correctness of the verdicts which they render, are evident daily."

A similar statement had been made by Judge Colden with reference to the regular trial jurors of Queens County. People v. Van Arsdale, 175 Misc. 980, 982, 26 N. Y. S. 2d 11, 13 (Queens Co. Ct. 1941).

[9] L. 1938, c. 552, as am. L. 1939, c. 40; L. 1940, c. 202; L. 1941, c. 402; L. 1942, c. 799. The provision is derived from L. 1896, c. 378, and L. 1901, c. 602.

tion of the officials of these counties.[10] Subdivision 4 of section 749-aa provides "Where, upon such application, it appears to the the court that by reason of the importance or intricacy of the case, a special jury is required, or that the subject-matter of the indictment or the issue to be tried has been so widely commented upon that the court is satisfied that an ordinary jury cannot without delay and difficulty be obtained to try such issue, or that for any other reason the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury, . . ." the court may order a special jury.

The statute provides some guides for the selection of special jurors,[11] the most significant of which is that a person selected have no conscientious opinions regarding the death penalty which would preclude finding a defendant guilty of a crime punishable by death. Observation of the several thousand general jury questionnaires in the course of the survey indicated that only a relatively small number[12] of those on the general jury panel fail to meet this and all the other tests[13] for qualification as a special juror. Since this is so, those charged with the selection of special jurors are forced to fall back upon their own opinions of what makes a "better" juror[14] in order to select three or four special jurors out of a hundred or so general jurors a large percentage of

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[10] L. 1941, c. 402.

[11] Subdivision 2 of section 749-aa reads:

"2. Persons ineligible. No person shall be selected as such special juror who is by law disqualified or who claims and is allowed exemption from service as a trial juror, or who has been convicted of a criminal offense, or found guilty of fraud or other misconduct by the judgment of any civil court or who possesses such conscientious opinions with regard to the death penalty as would preclude his finding a defendant guilty if the crime charged be punishable with death, or who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression, or whose opinion as to circumstantial evidence is such as would prevent his finding a verdict of guilty upon such evidence, or who avows such a prejudice against any law of the state as would preclude his finding a defendant guilty of a violation of such law, or who avows such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense, or who avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal to testify as a witness in his own behalf shall not create any presumption against him."

[12] Statistics published by the County Clerk of New York County indicate that the following percentages of new jurors stated that they could not find a guilty verdict in a death case: 16% for 1947–48, 14% for 1948–49, 16% for 1949–50 and 17% for 1950–51. 126 N. Y. L. J. 131 (July 24, 1951).

[13] See note 11 *supra*.

[14] See p. 166 *infra*, indicating the different stress placed upon formal education in the selection of special jurors in Bronx and Queens Counties.

whom meet the tests imposed by the statute. How this works in practice is indicated by the survey contained herein.[15]

Within the last few years two cases[16] have gone to the Supreme Court of the United States in attempts to have the special jury declared unconstitutional. Both attempts failed in five to four decisions.

In *Fay* v. *New York*[17] the attack was based upon three grounds, "(1) That laborers, operatives, craftsmen, foremen and service employees were systematically, intentionally and deliberately excluded from the panel. (2) That women were in the same way excluded. (3) That the special panel is so composed as to be more prone to convict than the general panel."[18]

In order to substantiate the first ground the convicted defendants offered a table showing a classification of the occupations of special jurors. This they sought to have the court compare with a table compiled five years earlier showing the occupation of employed residents of Manhattan and experienced, unemployed persons seeking employment who were such residents. The classification systems of the two tables offered for comparison differed.

The court pointed out the difference in time, in the classification system and the fact that many employed workers could not meet the admittedly constitutional requirements for general jury service.[19]

The court in refusing to hold the special jury unconstitutional on this first ground said, "An occupational comparison of the special panel with the general panel might afford some ground

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[15] See pp. 164–171 *infra*.

[16] Fay v. New York, 332 U. S. 261 (1947); Moore v. New York, 333 U. S. 565 (1948).

[17] *Supra* note 16.

[18] *Id.* at 272–73.

[19] Section 596 of the Judiciary Law provides:

"§ 596. Qualifications of jurors. In order to be qualified to serve as a juror in the counties included within a city having a population of one million or more, a person must: 1. Be a citizen of the United States, and a resident of the county.

2. Be not less than twenty-one, nor more than seventy years of age.

3. Be the owner, in his or her own right, of real or personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value.

4. Be in the possession of his natural faculties and not infirm or decrepit.

5. Not have been convicted of a felony or a misdemeanor involving moral turpitude.

6. Be intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly.

A person dwelling or lodging or having or maintaining a dwelling or lodging in a county for the greater part of the time between October first and June thirtieth next thereafter, is a resident of that county, within the meaning of this section."

for an opinion on the effect of the particular practices complained of in the composition of the special panel."[20] And further, "The testimony of those in charge of the selection . . . is that without occupational discrimination they applied the standards of the statute to all whom they examined. We are unable to find that this evidence is untrue."[21]

The Judicial Council has compiled several tables comparing the general and special jury panels for the period 1941–1950, such as suggested by the court, one of which deals with occupation.[22]

As indicated, a large majority of the general jurors meet the statutory standards for inclusion on the special panel.[23] However, the question remains unanswered what standards are used to select three or four out of a hundred or so qualified jurors. The appended tables[24] give some clues as to the answer to this question.

Concerning the inclusion and exclusion of women the court indicated that there is no constitutional right to be tried by a panel upon which any women are included, and *a fortiori*, to a panel upon which they are proportionately represented.[25]

Nevertheless the question arises, if women constitute ten per cent or twenty per cent of the general panel (a large majority of whom meet the statutory test for service on the special panel) why do they constitute a much smaller percentage of the special panel?

The court indicated that recent figures proving that special juries were more prone to convict might be of some significance.[26] However, since very few cases other than murder first degree cases are tried before special juries and almost all murder first degree cases are so tried, there exists no valid basis for a comparison. A table cannot be prepared showing the conviction rate in murder first degree cases by special and general juries as few[27] such cases are tried by general juries except in Queens County, where no cases are now tried by special juries. The small number of other cases tried before special juries as compared with the number of similar cases tried before general juries makes any comparison of dubious validity. In *Moore* v. *New York*,[28] the

[20] Fay v. New York, 332 U. S. 261, 276 (1947).
[21] *Id.* at 277.
[22] Table II, *infra*.
[23] See note 12 *supra*.
[24] See pp. 167–171 *infra*.
[25] Fay v. New York, 332 U. S. 261, 290 (1947).
[26] *Id.* at 278.
[27] No murder first degree cases were tried before general juries in New York and Kings Counties and only two such cases were tried before general juries in Bronx County.
[28] 333 U. S. 565, 567 (1948).

Supreme Court pointed out the falaciousness of an attempt to show varying conviction rates where only a small number of cases were involved or in attempting to compare murder first degree cases with other types of crimes.

In the *Moore* case the question of exclusion of women was again raised but was summarily disposed of. Also raised was the question of systematic exclusion of Negroes; this was disposed of as unproved.

In both the *Moore* and *Fay* cases there were strong dissents by Justice Murphy in which Justices Douglas, Black and Rutledge joined. In the *Moore* case he said:

> "The constitutional invalidity of this blue ribbon system does not depend upon proof of the systematic and intentional exclusion of any economic, racial or social group. Nor does it rest upon a demonstration that 'blue ribbon' juries are more inclined to convict than ordinary juries. . . .
>
> "The vice lies in the very concept of 'blue ribbon' panels—the systematic and intentional exclusion of all but the 'best' or the most learned or intelligent of the general jurors. Such panels are completely at war with the democratic theory of our jury system, a theory formulated out of the experience of generations. One is constitutionally entitled to be judged by a fair sampling of all one's neighbors who are qualified, not merely those with superior intelligence or learning."[29]

III. The Use of Special Juries

Special jury panels although authorized in counties having a population of one million or more, *i.e.*, New York, Bronx, Kings and Queens Counties, have fallen into disuse in Queens County. The special jury has not been used in Queens County for any purpose since November 1948. In only six instances have special juries been impaneled in Queens County during the last decade. All of these six panels were used in trials of defendants charged with murder in the first degree. Thus in effect the special jury provision now prevents seven hundred qualified jurors in Queens County from rendering any jury service since special jurors are not called for general jury service.[30]

From 1941 to 1950 the special jury has been used primarily for the trial of defendants indicted for murder first degree as a glance at the following table will indicate.

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[29] Moore v. New York, 333 U. S. 565, 569–70 (1948).

[30] This effect is similar to the effect caused by the retention of the little used sheriff's jury. See 6 N. Y. Judicial Council Report 263–66 (1940).

County	Number of Defendants Tried	Murder First Degree	All Others
New York	289	255	34
Kings	208	198	10
Bronx	43	35	8
Queens	11	11	0

Conversely, all of the murder first degree cases in Kings and New York Counties were tried before special juries.[31] and in Bronx County special juries were used in all but two instances in which the motions for a special jury made by the prosecution were denied.

The percentage of acquittals by such juries seems low. Only 13 defendants were acquitted out of 289 in New York County, an equal number out of 208 cases tried in Kings County, one of 45 in Bronx County, and one out of 11 in Queens County.[32]

Any party may request a special jury; however, with but one exception all of the requests were made by the prosecution.[33]

IV. Comparison of the Composition of the General Jury Panel with the Special Jury Panel in New York, Bronx, Kings and Queens Counties

A. Method of Compilation

The data upon which this report is based were compiled from the questionnaires filled out personally by the members of both the special and general jury panels and filed in the office of the County Clerk.[34]

All the special jurors' questionnaires were examined, except in Kings County where every other questionnaire was examined owing to the large number of special jurors.[35]

General juror questionnaires equal to the number of special juror questionnaires were examined. The method of selection of general

[31] This information was obtained from the District Attorneys of the counties concerned. See Table I, *infra*.

[32] See note 31 *supra*. The allegation that jurors serving on acquitting juries are systematically removed from the panel was disproved by this survey.

[33] See note 31 *supra*.

[34] Rules of the Jury System in the City of New York, Rule 17 prescribes a form of questionnaire. Rule 2 requires that they be filled out, "in his own hand," signed and sworn to.

[35] About 300 questionnaires were missing from the file in Kings County and not examined, because these jurors were then being called to serve on one of two cases.

juror questionnaires varied in each county due to the different filing and index systems in vogue. Thus, in New York all the questionnaires in every twenty-fourth file drawer were examined, in Kings the first thirteen questionnaires in each box were examined, in Bronx County fifty-seven questionnaires were picked at random from each of the fourteen file drawers, in Queens County eighty-eight questionnaires were picked at random from each of the eight drawers in which are filed the applications of jurors who served in 1951. In each case names beginning with each letter of the alphabet were obtained. Thus, a fair sample of the general panel is reflected by the figures published in the tables.

B. Occupation [56]

As the defendants in the *Fay* case attempted to prove, the most significant difference between the special and general panel is occupational.

A comparison shows that those generally assumed to rate higher in the economic structure predominate on the special panel, while the general panel more nearly represents a cross section of the community. Thus, those who may be called business people (executives, insurance men, real estate men, advertising men, manufacturers, bankers, dealers in securities, accountants, auditors, and buyers) constitute a large portion of the special panel: 47% in New York County, 43% in Bronx County, 45% in Kings County and 39% in Queens County, while they make up a much smaller portion of the general panel, 23% in New York County, 24% in Bronx County, 16% in Kings County and 15% in Queens County.

On the other hand, those who may be called working people (electricians, chauffeurs, drivers, personal servants, service and repairmen, labor union representatives, bookkeepers, miscellaneous skilled and unskilled laborers, superintendents of buildings, secretaries and stenographers, and clerks) constitute a larger portion of the general panel than they do of the special panel.

The tables indicate that the special jury lists contain the following percentages of such groups: 7% in New York, 25% in Bronx, 7% in Kings and 18% in Queens, while the general panel contains 7% in New York, 36% in Bronx, 40% in Kings and 45% in Queens n the groups mentioned.

The occupational tables indicate variations in stress from county o county. However, the trend is the same in all counties.

. Education [57]

The educational level on both panels varies considerably from ounty to county but in each county the educational level of the

[56] See Table II, *infra*.
[57] See Table III, *infra*.

special panel is higher than that of the general panel. The difference between the two panels is greatest in Queens County and least in Bronx County.

Thus, the percentage of special jurors who had gone at least part way through college was 60% in New York, 21% in Bronx, 43% in Kings, and 43% in Queens, while of the general list only 41% in New York, 17% in Bronx, 20% in Kings, and 12% in Queens had done so.

Conversely, those on the special jury list who had not gone beyond primary school constituted only 5% in New York, 21% in Bronx, 5% in Kings and 4% in Queens, while on the general list the percentages were 13% in New York, 22% in Bronx, 25% in Kings and 34% in Queens.

Those on the special list who had completed high school made up 25% in New York, 33% in Bronx, 26% in Kings and 27% in Queens. On the other hand, high school graduates constituted 32% in New York, 34% in Bronx, 24% in Kings and 26% in Queens of the general list.

The educational figures indicate that the selecting officials place much greater stress on formal education in Queens County than they do in Bronx County and that New York and Kings Counties fall between the two.

A glance at the occupational table[38] is in order in regard to education. It indicates that certain groups usually assumed to have high educational and intelligence levels are rarely selected for the special list. Thus, the number of the educators, teachers, librarians, college students and social workers on the special list is nineteen in New York, none in Kings and four in Queens. The general panel indicates ninety-six in New York, thirty in Kings and five in Queens. In Bronx County the trend is seven to four the other way.

D. Sex

The percentage of women on both panels varies considerably from county to county,[39] perhaps indicating that in some counties the selecting officials make less effort to obtain women who are willing to serve.[40]

Women on the special panel comprise 2% in New York, 10% in Bronx, less than 1% in Kings, and 11% in Queens. On the general panel women constitute 11% in New York, 22% in Bronx, 6% in Kings and 7% in Queens.

[38] See Table II, *infra*.
[39] See Table IV, *infra*.
[40] Women are qualified but exempt at their option. § 599, subd. 7, Jud. Law.

TABLE I

Disposition of Defendants Tried Before Special Juries

July 1, 1941 to *June* 30, 1950

	New York County	Kings County	Bronx County	Queens County
Defendants tried*	289	195	43	11
Convicted as charged	92	44	10	4
Convicted of lesser charge or on less than all counts	36	31	5	1
Pleaded guilty as charged	6	18	0	0
Pleaded guilty to lesser charge	118	67	23	5
Dismissed or acquitted by direction of court	12	19	2	0
Disagreement	12	3	2	0
Acquitted	13	13	1	1

*If a defendant was tried more than once, the outcome of each trial is recorded as though each involved a different defendant. Mistrials are not included, nor are cases in which the panel was discharged.

TABLE II

Comparison of Occupations of Special and General Jurors

	New York County		Kings County		Bronx County		Queens County	
	Special Jury Panel	General Jury Panel	Special Jury Panel	General Jury Panel	Special Jury Panel	General Jury Panel	Special Jury Panel	General Jury Panel
Promoters of business enterprise (salesmen, sales engineers, sales executives, retail merchants, jobbers, wholesalers, public relations men, etc.)	396	473	263	328	104	100	90	80
Executives, managers of industrial enterprises	263	157	233	77	66	27	105	47
Architects, engineers and draftsmen	146	75	139	36	37	17	62	28
Unclassifiable	145	113	40	62	28	17	13	22
Insurance men (salesmen, brokers, adjusters, etc.)	144	57	138	42	37	13	31	10
Bankers	121	24	64	3	21	1	16	3
Dealers in securities (stock brokers, bond brokers, traders, etc.)	116	39	24	5	8	2	8	1
Accountants and auditors	111	80	142	65	47	18	58	10
Clerks	98	182	207	193	116	67	71	60
Real estate men (brokers, salesmen, agents, managers, etc.)	94	43	33	14	29	4	28	5
Advertising men	78	30	19	11	8	1	6	2
Manufacturers (including contractors)	69	65	51	30	16	14	2	24
Artists	57	53	14	4	4	5	6	8
Disseminators of public information (publishers, editors, newspaper men, magazine men, etc.)	48	40	14	12	2	1	2	0
Housewives	39	200	8	96	66	144	80	38
Post office and Misc. civil service employees	36	59	0	58	2	69	2	17
Retired	31	25	11	11	32	14	4	8
Buyers and purchasing agents	27	24	49	14	12	7	8	6
Foremen, supervisors and superintendents	24	30	66	48	10	11	5	26
Scientists (physicists, chemists, psychologists, etc.)	22	16	15	6	4	2	8	2
Economists and statisticians	16	8	16	0	3	1	9	1

TABLE II — *Concluded*

Comparison of Occupations of Special and General Jurors

	New York County		Kings County		Bronx County		Queens County	
	Special Jury Panel	General Jury Panel	Special Jury Panel	General Jury Panel	Special Jury Panel	General Jury Panel	Special Jury Panel	General Jury Panel
Educators, teachers and librarians	13	65	0	23	5	2	1	0
Secretaries and stenographers	13	12	3	5	5	4	4	8
Miscellaneous skilled laborers	13	69	37	286	52	127	30	155
Importers and exporters	11	24	18	3	6	2	8	3
Entertainers	9	39	1	6	2	3	0	7
Superintendents of buildings	9	18	0	6	7	13	5	6
Miscellaneous unskilled laborers	9	27	4	51	7	21	3	13
Bookkeepers	6	24	17	16	14	5	5	3
Social workers	5	11	0	4	2	0	3	1
Miscellaneous	4	4	2	4	10	13	4	20
Photographers	4	11	3	5	1	2	0	1
Attorneys (including patent attorneys)	2	5	0	1	0	0	0	0
Labor union representatives	2	5	0	2	2	0	0	0
Medical technicians (nurses, podiatrists, optometrists, etc.	2	10	5	8	1	3	1	4
Inspectors and investigators	2	13	16	20	7	7	6	10
Service and repair men	1	9	8	27	5	14	2	13
College students	1	20	0	3	0	2	0	4
Personal service (waiters, housekeepers, hairdressers, etc.	1	13	1	18	10	21	1	17
Chauffeurs and drivers	0	7	0	40	4	20	0	20
Electricians	0	9	5	23	6	4	3	18
Total	2,188	2,188	1,666	1,666	798	798	700	700

TABLE III

Comparison of the Education of Special and General Jurors†

	New York County		Kings County		Bronx County		Queens County	
	Special Panel	General Panel	Special Panel	General Panel	Special Panel	General Panel	Special Panel	General Panel
Less than primary school	1	0	1	16	5	14	0	21
Primary school*	117	282	74	395	165	163	27	206
Part high school	72	137	256	372	80	91	84	120
High school*	538	717	435	405	266	274	192	184
Part college	289	247	249	133	65	64	106	42
College*	803	485	406	160	86	66	153	37
More than college	213	161	69	41	20	7	44	12
Business or technical**	108	97	165	115	102	88	91	73
Unclassifiable	47	62	11	29	9	31	3	5
Total	2,188	2,188	1,666	1,666	798	798	700	700

† The figures indicate the highest level attained, i.e., a person who indicated he had finished college is not included in the high or primary figures.

* On some of the questionnaries, in response to the question concerning education, there appeared only the words "primary," "high" or "college." With respect to these, it is not possible to discover whether the juror had actually completed all or only part of the level indicated.

** Most of the persons in this group indicated that they had finished all or part of high school. They are not included, however, in the category of "high" or "part high."

TABLE IV

Comparison of the Number of Women on Special and General Jury Panels

New York County		Kings County		Bronx County		Queens County	
Special Panel	General Panel	Special Panel	General Panel	Special Panel	General Panel	Special Panel	General Panel
53 out of 2,188	253* out of 2,188	12 out of 1,666	113 out of 1,666	80 out of 798	172 out of 798	80 out of 700	46 out of 700

* Statistics published by the County Clerk in New York County show 6,727 women out of a total of 60,960 appeared on the panel at the end of the year 1950–1951. Both the survey and figures for the entire panel indicate that women constitute slightly more than 11% of the general panel in New York County. 126 N. Y. L. J. 131 (July 24, 1951).

FILED
MAY 1 1953
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1952

No. 452 Misc.

WILLIAM VANDERWYDE,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK S. HOGAN
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Proceedings Below

Petitioner was convicted of the crime of Murder in the First Degree (Penal Law, §1044, subd. 1), by a judgment of the Court of General Sessions, New York County, rendered on April 30, 1952, and was sentenced to death (10-1).* The judgment of conviction was affirmed, without opinion, by the Court of Appeals (304 N. Y. 937, motion to amend remittitur granted, 305 N. Y. 552). The proceedings in the courts below are, so far as here relevant, set forth at pages one to four of the petition.

Nature of the Prosecution

The petitioner and the deceased, Benjamin Dietz, were employed by a steamship company as a stevedoring gang foreman and a hiring boss, respectively, on a pier in New

* References are to pages of the printed record.

York City (218-9, 221-4). The indictment charged that, on or about May 18, 1951, the petitioner, with malice aforethought, shot Dietz to death with a pistol (5).

The evidence established that, on the night of May 18, 1951, the petitioner went to Dietz's home in the Greenwich Village section of the city, summoned him to the street, and there, a few minutes later, shot him with a revolver (71-3, 76-80, 84-7, 95-7, 111-3, 123-7, 204-5). A bullet through his heart, Dietz died almost on the spot, and with him, whatever he might have been able to tell about the motive for the killing (33, 37-40, 81, 87-92; Exhs. 1, 2, offered at 43, 64-5, reproduced at 297, 299). A police lieutenant, Patrick Sullivan, an eye-witness to the shooting, was the respondent's principal witness. He had happened upon the scene while off duty, a few moments before the occurrence, and, though not effective in preventing it, had pursued the petitioner and downed him with a bullet after a four-block chase (84-7, 93-5, 103-5, 110-1, 126, 135-6; Exh. 3, offered at 44, reproduced at 301).

Aside from an attempt to show that the petitioner and Dietz were good friends, the defense consisted principally of cross-examination of Sullivan, apparently with a view to showing that his testimony was implausible, self-contradictory, inconsistent with his grand jury testimony, and, in general, a fabrication (103-163).

The jury were instructed by the trial court that they could find the petitioner guilty, if at all, of Murder in the First Degree (intentional, deliberate and premeditated killing), Murder in the Second Degree (intentional killing without deliberation and premeditation) or Manslaughter in the First Degree (unintentional killing in the heat of passion with a dangerous weapon) [267-71, 282-5; see Penal Law, §1044, subd. 1; 1046; 1050, subd. 2]. They found him guilty of Murder in the First Degree (286-8).

Questions Presented and the Respondent's Position

The jury were drawn from a list of persons constituting a panel of special jurors for New York County, maintained as required by section 749-aa of the Judiciary Law (16-8). Under that law, a special jury may be selected for the trial of an action only where the State Supreme Court or the trial court so orders upon the motion of a party (Judiciary Law, §749-aa, subd. 4). Otherwise, the jury is drawn from the general panel provided for by Article 17 of the Judiciary Law (§§590-609; see §§741-743). In the instant case, the order was granted upon a motion made by the respondent and opposed by the petitioner (12-20).

The petitioner now claims that the order providing for a special jury violated the constitutional guarantee of due process of law because the affidavit upon which it was granted did not state any facts that would justify the order under New York law (Petitioner's Brief, pp. 11-5). He also claims that he was denied due process of law and the equal protection of the laws because the special jury statute, as construed by the Court of Appeals, permits—and permitted in this case—special juries to be ordered in capital cases generally, systematically and indiscriminately merely because requested by the prosecution (*id.*, pp. 15-9, see p. 18).

The respondent's position is that, in ordering a special jury, the trial court properly exercised its discretionary power under a statute that is constitutionally unexceptionable and that is not shown to be unfairly administered.

ARGUMENT

No substantial question is presented.

This Court has twice explicitly held that the special jury statute here involved (Judiciary Law, §749-aa) does not violate the principles of the Fourteenth Amendment [*Moore* v. *New York,* 333 U. S. 565; *Fay* v. *New York,* 332 U. S. 261; see also *Hall* v. *Johnson,* 186 U. S. 480 (dealing with predecessor statute, N. Y. Laws 1896, ch. 378)].

Under this statute, a trial may be had before a special jury where the court finds that, for any reason, "the due, efficient and impartial administration of justice in the particular case would be advanced" thereby (Judiciary Law, §749-aa, subd. 4). The "importance or intricacy" of a case are two prime reasons for invoking a special jury (*id.*). Since it is obvious that no case is more important than a murder prosecution possibly entailing capital punishment, it is wisely held that this factor alone is sufficient to justify the use of a special jury [*People* v. *Hall* (1901) 169 N. Y. 184, 196-197].

In the present case, therefore, the allegation that the charge was Murder in the First Degree unquestionably established the importance of the case (see Penal Law, §1045). In addition, it is clear that, as the moving affidavit also alleged, intricate questions of fact and law were involved. This is evident from the circumstance that the jury were required to consider three degrees of homicide and, in doing so, to make factual determinations involving subtle distinctions of a sort that have sometimes puzzled even the highest court in the state [see *supra,* p. 2; New York Law Revision Commission, *Communication and Study Relating to Homicide* (1937), pp. 26-98].

There is no substance, therefore, to the petitioner's claim that there were no allegations of fact sufficient to justify the ordering of a special jury (see Petitioner's Brief, Point I, pp. 11-5). In any event, that claim does not pose a constitutional question, since the Constitution does not regulate the modes of procedure in state courts, nor require them to be free from error, beyond imposing conformity to traditional concepts of fairness (*Betts* v. *Brady,* 316 U. S. 455; *Snyder* v. *Massachusetts,* 291 U. S. 97; *Brown* v. *New Jersey,* 175 U. S. 172; see *Frank* v. *Mangum,* 237 U. S. 309, 338-343).

Equally without force is the petitioner's contention that he was denied the equal protection of the laws because the procedure followed was one which is applied "generally, systematically or indiscriminately for the mere asking" (see Petitioner's Brief, Point II, p. 18). In the light of the principle that denial of equal protection of the laws is made out only by a showing of purposeful discrimination, it is apparent that this contention negates itself (*Snowden* v. *Hughes,* 321 U. S. 1; *Hysler* v. *Florida,* 315 U. S. 411, 422-423; *Brown* v. *New Jersey, supra,* 175 U. S. 172, 176-177). There is no assertion that the prosecution purposefully discriminated against the petitioner in requesting a special jury. Nor could there be any such assertion unless the statistics contained in Appendix B of the Petitioner's Brief (p. 164)—showing that from 1941 to 1950 every first-degree Murder trial in New York County was by special jury—are claimed not to reflect the situation at the present time.

The petitioner's claims are, apparently, directed solely to the procedure used in deciding that a special jury should be used in this case, rather than to the manner in which the special jury panel is made up. However, as the peti-

tion contains an assertion that statistics included in Appendix B furnish cogent reasons for a consideration of the latter question (Petition, pp. 7-9), we shall discuss the question briefly.

The statistics, so far as here pertinent, purport to show (1) that the special jury panel, as compared to the general panel, contains "a disproportionate weighting in favor of 'business' people as opposed to 'working' people" (Petition, Appendix B, p. 158, Table II, pages 168-9), and (2) that there is a high ratio of convictions in cases tried before special juries (*id.*, Table I, p. 167). The compilers concede, however, that "there are no adequate facts that prove that the special jury is a convicting jury since it cannot be assumed that a banker is more 'prejudiced' against a person accused of murder than a plumber" (*id.*, p. 159).

These statistics were not made part of the record considered by the courts below, nor was the respondent accorded an opportunity to controvert or explain them.

Had such an opportunity been accorded, the record might well have afforded the Court a basis upon which to determine whether the alleged numerical weighting in favor of "business" persons was the result of a purpose to discriminate against the "working" group as such. Lacking a showing that that was the case, the record is wholly inadequate to indicate a violation of the Fourteenth Amendment (*Moore* v. *New York, supra,* 333 U. S. 565, 568-569; *Fay* v. *New York, supra,* 332 U. S. 261, 290-294). Indeed, information that the Court has received recently indicates that there is no history of such a discriminatory purpose in the administration of the statute (see *Fay* v. *New York, supra,* 332 U. S. 261, 291).

Nor do the figures relating to the rate of convictions by special juries serve to cast doubt on the administration of the law. The inconclusiveness of these figures with respect to the problem at hand has been explicitly pointed out by the Court in the *Moore* and *Fay* cases (see *Moore* v. *New York, supra,* 333 U. S. 565, 566-567; *Fay* v. *New York, supra,* 332 U. S. 261, 278-281).

Conclusion

The petitioner's claim that the order for a special jury was unjustified is without merit and, moreover, serves to raise only a question of state procedure that presents no semblance of conflict with the Constitution. The record contains no basis for an attack on the administration of the special jury law.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May, 1953

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HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 452 Misc.

WILLIAM VANDERWYDE,

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against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

RUDOLPH STAND,
Counsel for Petitioner.

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, William Vanderwyde, respectfully prays that this Court grant rehearing of its order of May 18, 1953 denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, affirming a judgment of conviction and sentence of death imposed by the Court of General Sessions, New York County, upon a verdict rendered by a special or so-called "blue ribbon" jury convicting petitioner of the crime of Murder in the first degree.

A stay of execution of the death sentence was granted by Honorable Edmund H. Lewis, Associate Judge (now Chief Judge) of the Court of Appeals of the State of New York, pending the determination by this Court of

the petition for certiorari herein. Petitioner is confined in the Death House at Sing Sing State Prison, Ossining, New York.

This petition for rehearing is filed within the time prescribed in Rule 33 and is made pursuant to the provisions of the said Rule.

Reasons for Granting Rehearing and Issuing the Writ

I.

The petition for certiorari presented a substantial Federal question which justified a review of the case.

II.

There is a marked distinction between the case at bar and the cases of *Fay* v. *New York*, 332 U. S. 261 (1947) and *Moore* v. *New York*, 333 U. S. 565 (1948).

III.

In the light of the 1952 Judicial Council Report made part of the petition for certiorari, the record presented serious and important questions in the administration of criminal justice, which should be re-examined and again subjected to judicial scrutiny.

We have given long and anxious consideration as to the propriety of making this application for a rehearing. Counsel—no matter how experienced—always labors under a tremendous strain, anxiety and responsibility in the defense of one accused of murder and in the conduct of an appeal in the event of a conviction. The duty is at all times onerous and of a very delicate and exacting character.

It is needless to say that we do not file this petition for a rehearing merely to gratify a desire to argue again the very questions which have already been submitted and considered by this Court.

We feel, however, that inasmuch as this is a capital case —with the petitioner's life at stake—there is a strong possibility that the arguments advanced in our original petition were not presented with sufficient clarity to warrant the allowance of the writ. If we are correct in this assumption, we feel justified in further occupying the time of the Court with a consideration of the case by presenting matters not previously urged, which will clarify the contentions set forth in our original petition and brief.

The respondent, in opposition to the petition, makes the sweeping statement in his brief (p. 4) that no substantial question is presented and cites the five to four decisions of *Fay* v. *New York,* 332 U. S. 261 (1947) and *Moore* v. *New York,* 333 U. S. 565 (1948).

These cases, however, were each decided upon its special circumstances and must be understood to be confined to the record then before this Court. To what extent a different record would have resulted in a different conclusion was not indicated. It certainly cannot be reasonably argued that this Court intended to put an irrevocable end and to close the door forever on this highly controversial and serious question.

In our original petition we placed great reliance upon the 18th Annual Report (1952) of the Judicial Council of the State of New York (Appendix B, p. 23).

Its Recommendation and Survey relating to the abolition of special juries—on the basis of *presently existing facts* and statistical tables covering the years 1941 through 1950 —discloses to absolute demonstration that the fundamental concept of a special jury is repugnant to the traditional

right of a person to be tried by a jury of his peers. Such system has no proper place in our American jurisprudence.

The Judicial Council's Report is not the partisan plea of an advocate. It constitutes a critical study and impartial analysis made by an official body of an important and serious problem in the administration of criminal justice and its survey is entitled to great weight and respect.

Surely, in the light of the Report, much stronger reasons now exist which call for a review of the decision in the present case as compared with the grounds prompting this Court to review the *Fay* and *Moore* cases, *supra*.

It is an interesting commentary on the respondent's brief that no real effort is made to meet our contention at page 9 of the original petition that the official statistics contained in the Judicial Council's report reflecting presently existing conditions furnish the most cogent reasons for a further consideration and complete re-examination of the question herein involved. The respondent asserts at page 6 of his brief that these statistics were not made part of the record considered by the courts below, nor was the respondent accorded an opportunity to controvert or explain them.

If such official statistics could, in fact, have been controverted or explained, it was within the respondent's power to do so in the brief in opposition. The respondent is careful enough to point out at page 6 that the compilers of the Report concede that "there are no adequate facts that prove that the special jury is a convicting jury since it cannot be assumed that a banker is more 'prejudiced' against a person accused of murder than a plumber."

The compilers, however, also state at page 159 of Appendix B (Petition, p. 23):

> "Even though murder trials are in some respects more 'important' than others, there does not seem to be any

factual basis for the assumption that they are more difficult of proof or more complex or require more understanding or ability on the part of the jurors than many other types of cases. Nor can it be seriously argued that murder trials in counties of more than one million population are more intricate or difficult of comprehension than in counties of less than one million.

Trying one indicted for murder in Kings County by a special jury, aside from any question of constitutionality, but trying those similarly indicted in nearby Nassau County by a general jury does not readily appeal to reason or sound public policy."

The guaranty of due process of law requires "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land'" (*Hebert* v. *Louisiana*, 272 U. S. 312, 316-7).

No question—as here—was raised in the *Fay* and *Moore* cases, *supra*, as to the legal insufficiency of the District Attorney's affidavit in support of the motion for a special jury (R. 14-15) and that the order granted thereon over the opposition of the defendant constituted a denial of due process and a violation of the defendant's rights under the Fourteenth Amendment of the Constitution of the United States.

We argued this question in our original brief and will not repeat it here. We have, however, examined the moving affidavit in the *Fay* case, *supra*, and can well understand why the point was not raised in that case, since the affidavit there was carefully drawn and contained factual allegations, bringing the case within the terms of the statute (Section 749-aa, subd. 4, Judiciary Law).

In the case at bar, however, the moving affidavit is barren of any allegations of fact, merely following the language of the statute. The respondent takes the position (Brief, p. 4) that the simple allegation that the defendant is charged with a capital offense was sufficient under the case of *People* v. *Hall,* 169 N. Y. 184, 196-7, decided over 50 years ago, when entirely different conditions prevailed.

We maintained in our original brief that the *Hall* case, *supra,* was inapplicable and as construed and applied to the defendant constituted a denial of due process of law. It is a settled principle of interpretation, that you can neither read words into a statute, nor out of a statute. As the selection of a special panel was a departure from the ordinary methods of criminal procedure, the statute required an accurate and strict construction and the trial court was without jurisdiction to extend it by implication to a case not falling within its terms. If the Legislature intended that every capital case must be tried by a special jury, it was easy to say so and insert words to that effect.

A court in interpreting a statute cannot hold that the Legislature must have intended to do that which it has failed to do. A court's refusal to recognize the plain meaning of the statute indicates a purpose to change the law by judicial action.

As to the Prosecutor's Secret File Relating to the Past Performances of "Repeater" Blue Ribbon Jurors

It is most significant that the respondent completely ignores the unfair system in operation to which we called attention in our original petition and brief at pages 6-7; 9-10; 14-15. We pointed out that the prosecutor kept confidential records made up of the "past performances" of special jurors who have previously served in capital cases

thus enabling him to exclude a proposed special juror who may have served on an acquitting jury, with the result that—unknown to the defense—the jury box can be filled in part or entirely of special jurors who have previously voted for convictions.

Here, once more, is another issue which was not before this court in the *Fay* and *Moore* cases, *supra.* The argument which might be made in criticism of this system is too extensive and involved for complete presentation upon this application. Suffice it to say that such mode of trial is essentially unfair and liable to grave abuse. A question so fundamental to the rights of defendants, which arises frequently in capital cases, is a federal question of the utmost importance which we submit, has not been, but should be, settled by this Court.

In *Hildredth* v. *Troy,* 101 N. Y. 234, at 239-40, the Court of Appeals declared:

> "The jury system to be successfully administered requires not only absolute impartiality in fact, in the drawing of jurors, but such an adherence to forms and methods of procedure as will secure public confidence and prevent any suspicion of improper or unfair dealing."

A fair trial is in all of the decisions of the Supreme Court declared to be one of the conditions without which due process of law cannot exist (*Ong Chang Wing* v. *United States,* 218 U. S. 272, 279-80; *Hill* v. *Texas,* 316 U. S. 400, 406).

The right of peremptory challenge in capital cases, has been spoken of as "one of the most important of the rights secured to the accused" (*Pointer* v. *United States,* 151 U. S. 396, 408).

The defendant is entitled to be tried by the first twelve competent, unbiased and qualified jurors drawn by lot.

To be deprived of a juror who is competent impairs a substantial right of a defendant. The rejection of a competent juror is ground of error, although the jurors who actually try the case are competent, it is the right of a party to require that the range of selection shall not be limited by excluding without cause a competent juror from the panel. (*Hildredth* v. *Troy, supra,* 101 N. Y. 234; *People* v. *McQuade,* 110 N. Y. 284, 306).

Conclusion

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals of the State of New York as prayed in the petition. To do otherwise, in the present case, means the death of this petitioner, the victim of "a tragic consequence that can flow from the use of the 'blue ribbon' jury" (Dissenting opinion by Justice Murphy, in which Justices Black, Douglas, and Rutledge concurred in *Moore* v. *United States, supra,* 333 U. S., 565, 569).

RUDOLPH STAND,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

RUDOLPH STAND,
Counsel for Petitioner.